

RECEIPT NUMBER

534943

ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

12

INERGI, L.L.C. d/b/a Inergi Fitness,
a Delaware Limited Liability Company,

Plaintiff,

v.

JOHN DALY ENTERPRISES, L.L.C
a Florida Limited Liability Company,

Defendant.

JUDGE : Friedman, Bernard A.
DECK : S. Division Civil Deck
DATE : 12/01/2005 @ 12:34:01
CASE NUMBER : 2:05CV74551
COMP INERGI V. JOHN DALY
ENTERPRISES (AWT)

MAGISTRATE JUDGE PAUL J. KOMIVES

TOM J. BERMAN (P67595)
Attorney for Plaintiff
30833 Northwestern Hwy, Suite 121
Farmington Hills, MI 48334
(248) 626-3955

COMPLAINT

The Plaintiff, Inergi, L.L.C., ("Inergi"), d/b/a Inergi Fitness, by and through its attorney, Tom J. Berman, hereby files its Complaint against the Defendant, John Daly Enterprises, L.L.C. ("John Daly Enterprises"), and in support thereof, states of follows:

JURISDICTION AND VENUE

1. This action arises under the trademarks laws of the United States (15 U.S.C. § 1051 et. seq. of the Lanham Act).
2. This Court has original jurisdiction over this matter pursuant to 15 U.S.C. § 1121 and 28 U.S.C. § § 1331 and 1338.
3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c).

THE PARTIES

4. Plaintiff Inergi is a limited liability company organized and existing under the laws of the State of Delaware. Its principal place of business is located at 304 Tequesta Drive, Suite 100, Tequesta, FL 33458.

5. Plaintiff Inergi markets, distributes, and sells exercise equipment, including but not limited to, a manually operated variable resistance apparatus for strengthening muscles. Inergi's exercise equipment is marketed and sold to customers throughout the United States, including residents of the State of Michigan.

6. Upon information and belief, Defendant John Daly Enterprises is a limited liability company organized and existing under the laws of the State of Florida. Its principal place of business is located at 290 S. Military Trail, Deerfield Beach, FL 33442.

7. Upon information and belief, Defendant John Daly Enterprises markets, sells and distributes, various golf products, including golf exercise and training devices, golf apparel, golf accessories, and golf memorabilia, as well as non-golf novelty products.

8. Upon information and belief, Defendant John Daly Enterprises markets, sells and distributes its products to customers throughout the United States, including residents of the State of Michigan. Its products are made available to consumers through various third party retail outlets having stores located in southeast Michigan and elsewhere.

9. Upon information and belief, Defendant John Daly Enterprises operates a website at www.johndaly.com through which it markets, sells, and distributes its products.

10. Upon information and belief, Defendant John Daly Enterprises also markets, sells,

and distributes its products through independently operated Internet websites.

11. Upon information and belief, John Daly Enterprises also markets, sells and distributes its products to consumers through its "John Daly Merchandising Trailer". The trailer operates as a retail-store-on-wheels, traveling to golf tournaments at which professional golfer John Daly is participating, including but not limited to, the Buick Open held at Warwick Hills Golf & Country Club located in Grand Blanc, Michigan. The trailer enables consumers to purchase products marketed, sold, and distributed by John Daly Enterprises.

COMMON FACTUAL ALLEGATIONS

12. Plaintiff Inergi markets, distributes and sells its fitness equipment under various trademarks, including but not limited to the mark POWERBELT.

13. To protect the value and goodwill of its POWERBELT mark, Inergi obtained a United States federal registration for its mark. The POWERBELT mark is registered under U.S. Trademark Registration No. 2,163,562, registered June 9, 1998, for exercise equipment, namely, manually operated variable resistance apparatus for strengthening muscles.

14. Plaintiff Inergi's POWERBELT trademark registration is incontestable.

15. Plaintiff Inergi has the exclusive right, as the owner of U.S. Trademark Registration No. 2,163,562, to use the POWERBELT mark in connection with the goods identified in the federal registration.

16. Plaintiff Inergi has been using its POWERBELT mark continuously for at least the past 8 years. Throughout that time, Inergi has expended significant time, money, and effort establishing public recognition of its POWERBELT mark.

17. Plaintiff Inergi uses its POWERBELT mark in advertising and for promoting the sale and distribution of its products throughout the United States, and has established substantial consumer recognition of the POWERBELT mark and the goodwill associated with it.

18. Defendant John Daly Enterprises currently advertises and promotes a golf swing training and exercise device under the mark "Powerbelt". Upon information and belief, John Daly Enterprises markets and sells its golf training and exercise device to consumers through Internet websites independently operated by third party retailers. Upon Information and belief, John Daly Enterprises also markets and sells its golf swing device through stores operated by independent retailers.

19. Representatives of Plaintiff Inergi have contacted representatives of John Daly Enterprises on numerous occasions demanding that John Daly Enterprises immediately cease and desist from any and all use of Inergi's POWERBELT mark. Representative of John Daly Enterprises have responded by stating they do not consider John Daly Enterprises' use of the "Powerbelt" mark to be an infringement of Inergi's rights in the mark.

20. Defendant John Daly Enterprises' intentional and continued use of Plaintiff Inergi's trademark has prompted the filing of the present lawsuit.

**COUNT I
FEDERAL TRADEMARK INFRINGEMENT**

21. Plaintiff Inergi hereby adopts and incorporates by reference Paragraphs 1 through 20 above as though fully set forth herein.

22. Inergi owns a valid and subsisting federal trademark registration for the mark

POWERBELT, U.S. Registration No. 2,163,562, and enjoys all the rights associated therewith.

23. By advertising, distributing and selling its golf swing training and exercise device under the mark "Powerbelt", Defendant John Daly Enterprises has infringed on the rights enjoyed by Plaintiff Inergi under its federally registered POWERBELT mark. Such unlawful use by John Daly Enterprises has and is likely to cause confusion, deception, and/or mistake in violation of 15 U.S.C. § 1114.

24. Plaintiff Inergi has no adequate remedy at law.

25. Defendant John Daly Enterprises' unauthorized use of Plaintiff Inergi's POWERBELT mark has caused injury to Inergi in an amount not yet ascertained.

26. Plaintiff Inergi is entitled to those remedies provided under Title 15 of the United States Code.

COUNT II
FEDERAL UNFAIR COMPETITION UNDER 15 U.S.C. § 1125(a)

27. Plaintiff hereby adopts and incorporates by reference Paragraphs 1 through 26 above as though fully set forth herein.

28. Plaintiff Inergi's POWERBELT mark has come to be associated in the minds of the purchasing public with Inergi's exercise equipment and has achieved a requisite degree of celebrity in the minds of the purchasing public.

29. Defendant John Daly Enterprises' conduct wrongfully and falsely designates its goods as originating with or being affiliated with Inergi and constitutes the use of false description or false representation in interstate commerce.

30. The conduct of Defendant John Daly Enterprises is intended to and is likely to deceive, to cause mistake, or to cause confusion in members of the public who are wrongfully lead to believe that John Daly Enterprises' goods are associated or connected with Plaintiff Inergi, or that Inergi sponsors or approves the golf training device being advertised, sold and distributed by Defendant John Daly Enterprises.

31. The continued unauthorized use by Defendant John Daly Enterprises of the mark "Powerbelt" in relation to its golf training and exercise device is intended to cause, has caused, and will continue to cause, confusion and deception of the public to the serious irreparable harm of Plaintiff Inergi.

32. Defendant John Daly Enterprises' conduct thus deprives Plaintiff Inergi of its valid trademark rights and other rights against federal unfair competition, in violation of 15 U.S.C. § 1125(a).

33. By reason of the forgoing, Plaintiff Inergi has been injured in an amount not yet ascertained.

**COUNT III
CYBERPIRACY UNDER 15 U.S.C. § 1125(d)**

34. Plaintiff Inergi hereby adopts and incorporates by reference Paragraphs 1 through 33 above as though fully set forth herein.

35. Upon information and belief, Defendant John Daly Enterprises operates an Internet website at www.johndalypowerbelt.com. The website is used to advertise, sell and distribute a golf swing training and exercise device under the mark "Powerbelt".

36. The domain name johndalypowerbelt.com incorporates Plaintiff Inergi's federally registered POWERBELT mark and is thus confusingly similar to Inergi's registered mark.

37. Upon information and belief, the johndalypowerbelt.com domain name was registered on October 31, 2003.

38. Plaintiff Inergi's POWERBELT mark was distinctive at the time Defendant John Daly Enterprises registered its johndalypowerbelt.com domain name.

39. Defendant John Daly Enterprises use of Plaintiff Inergi's POWERBELT mark in its johndalypowerbelt.com domain name demonstrates a bad faith intent to profit from the goodwill associated with Inergi's mark.

40. Plaintiff Inergi has been injured by Defendant John Daly Enterprises' registration and use of a domain name incorporating Inergi's POWERBELT mark and has no adequate remedy at law for such injury.

**COUNT IV
DILUTION OF FAMOUS MARK UNDER 15 U.S.C. § 1125(c)**

41. Plaintiff Inergi hereby adopts and incorporates by reference Paragraphs 1 through 40 above as though fully set forth herein.

42. Within the exercise and fitness industry, Plaintiff Inergi's registered POWERBELT mark has become famous, and as such, has become associated with Plaintiff Inergi.

43. Defendant John Daly Enterprises' wrongful use of the mark "Powerbelt" has caused, is causing, and will continue to cause derogation of the rights protected under 15 U.S.C.

§ 1125(c).

44. Plaintiff Inergi has been injured by such dilution of its famous mark and has no adequate remedy at law for such injury.

**COUNT V
COMMON LAW UNFAIR COMPETITION**

45. Plaintiff Inergi hereby adopts and incorporates by reference Paragraphs 1 through 44 above as though fully set forth herein.

46. The acts complained of herein are in violation of the laws of the State of Michigan and constitute acts of unfair competition thereunder.

WHEREFORE, the plaintiff, Inergi, L.L.C., d/b/a Inergi Fitness, respectfully requests that:

- (A) Inergi's POWERBELT mark be found to be valid and subsisting;
- (B) John Daly Enterprises' use of the mark "Powerbelt" be found to be an infringement of Inergi's rights in its mark;
- (C) John Daly Enterprises, its employees, servants, agents, and all others acting in concert with them, be enjoined, both preliminarily during the pendency of this litigation as well as permanently thereafter, from using the mark "Powerbelt", or any other mark which is a colorable imitation thereof, in such a manner that there is likelihood of confusion as to the source of the goods or services which the public associates with Inergi, including, *inter alia*, any website, metatag, link, catalog, or in any fashion whatsoever;
- (D) John Daly Enterprises, its employees, servants, agents, and all others

acting in concert with them, be enjoined from otherwise competing unfairly with Inergi through use of the mark "Powerbelt", or any other colorable imitation thereof, which is likely to cause a false designation or false association between the goods and services of John Daly Enterprises and those of Inergi, or otherwise unfairly competing with Inergi;

(E) John Daly Enterprises be directed to file with this Court and serve on Inergi within thirty (30) days after service of an order enjoining John Daly Enterprises as described above, a report in writing and under oath setting forth in detail the manner and form in which John Daly Enterprises has complied with the injunction;

(F) John Daly Enterprises be ordered to account for and pay over to Inergi all profits, gains, and advantages, wrongfully realized by John Daly Enterprises in association with those acts which constitute infringement of Inergi's rights as described above and that such determined amount be trebled as provided in the statute;

(G) John Daly Enterprises be required to pay Inergi's costs, expenses, and reasonable attorney fees, incurred in connection with this action as provided under 15 U.S.C. §1117, as this is an "exceptional case" within the meaning of that section, along with pre-judgement interest commencing from the date of service of this Complaint;

(H) John Daly Enterprises be required to deliver up for impoundment or destruction, all materials in its possession which bear or display the mark "Powerbelt", or any colorable imitation thereof which is likely to cause confusion or false designation of origin with the marks owned by Inergi, and the goods and services associated therewith, together with any and all plates, negatives, or other items of reproduction capable of use in printing, reproducing, or duplicating Inergi's mark or any colorable imitation thereof;

(I) John Daly Enterprises immediately cause to be removed from the Internet, whether in a website, as a metatag, or as part of a search engine, any reference to the mark "Powerbelt" or any colorable imitation thereof;

(J) John Daly Enterprises immediately cease any and all use of the mark "Powerbelt", or any colorable imitation, in any Internet search engine; and

(K) Inergi be awarded such other and further relief as the Court deems appropriate under the circumstances.

Respectfully Submitted,

TOM J. BERMAN

A handwritten signature in black ink, appearing to read 'Tom J. Berman', is written over a horizontal line.

By: Tom J. Berman (P67595)
30833 Northwestern Hwy, Suite 121
Farmington Hills, MI 48334
(248) 626-3966

Dated: November 14, 2005

(Rev. 11/04)

CIVIL COVER SHEET County in which this action arose

ORIGINAL
Wayne County

JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS *Inergi LLC d/b/a Inergi Fitness*DEFENDANTS *John Daly Enterprises, LLC*(b) County of Residence of First Listed Plaintiff *Martin County Florida*
(EXCEPT IN U.S. PLAINTIFF CASES)County of Residence of First Listed Defendant *Palm Beach County Florida*
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

*Tom J. Berman
30533 Northwestern Hwy Ste. 121
Farmingdale Hills MI 48334 (248) 626-3735*

Attorneys (If Known)

05-74551

BERNARD A. FRIEDMAN

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☐ 1 PTF ☐ 1 DEF
- Citizen of Another State ☐ 2 PTF ☐ 2 DEF
- Citizen or Subject of a Foreign Country ☐ 3 PTF ☐ 3 DEF
- Incorporated or Principal Place of Business in This State ☐ 4 PTF ☐ 4 DEF
- Incorporated and Principal Place of Business in Another State ☒ 5 PTF ☒ 5 DEF
- Foreign National ☐ 6 PTF ☐ 6 DEF

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 137 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 861 HIA (139511) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) SOCIAL SECURITY <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
			FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

*Trademark violation / infringement**15 U.S.C. § 1051 et seq. & the Lanham Act*

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

12-1-05

SIGNATURE OF ATTORNEY OF RECORD

Tom J. Berman

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed?

☐ Yes
☒ No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

☐ Yes
☒ No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

Notes :
